72-329

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-329

CHARLES SCHRENZEL,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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IN THE

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OCTOBER TERM, 1971

No. .....

CHARLES SCHRENZEL,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Charles Schrenzel, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on June 28, 1972.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals on June 28, 1972, in a majority opinion which has not yet been officially reported. A separate

opinion, concurring in part and dissenting in part, was written by Circuit Judge Heaney. The opinions are reproduced as Appendix A hereto.

Orders were entered by District Judge Webster on April 8 and April 9, 1971, overruling certain pre-trial motions filed by petitioner. These orders (A. 18-22)[1] have not been officially published.

On July 28, 1972, the Court overruled petitioner's petition for rehearing en banc or, in the alternative, for a rehearing. (See Appendix C.) No opinion was written, and the order has not been officially published.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 28, 1972 (Appendix B hereto). A timely petition for rehearing en banc or, in the alternative, for a rehearing was denied on July 28, 1972. (See Appendix C.)

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

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[1] The certified transcript of the record prepared at petitioner's request by the Clerk of the United States Court of Appeals for the Eighth Circuit includes the Appendix filed in said Court pursuant to Rule 30 of the Federal Rules of Appellate Procedure. Reference in this petition to such Appendix shall be by use of the letter "A.", followed by the appropriate page number.

QUESTIONS PRESENTED

I

Whether the Courts below erred in submitting the cause to the jury because of fatal variances between the indictment and proof.

II

Whether the Courts below erred in giving and approving instructions to the jury which:

A. were repetitious because of the inclusion of four separate counts in the indictment;

B. were not in conformity with the statute under which petitioner was charged;

C. permitted a person not authorized by statute to determine which drugs are contraband, thereby delegating a legislative function to an administrative official;

D. in effect directed a verdict of guilty; and

E. created a variance from the indictment and evidence.

III

Whether petitioner could be tried and sentenced consecutively on four separate counts when the evidence indicated continuing transactions relating to an illegal drug business over a period of time.

IV

Whether petitioner was deprived of his constitutional due process rights in being tried in the federal court without a prior hearing to determine whether he should be tried in the state or federal courts.

V

Whether petitioner was entitled to a continuance of the trial in order to complete an investigation as to the source of the drugs which were not made available to him for inspection until the morning of trial.

VI

Whether petitioner was entitled to inspect the record of grand jury proceedings; and, if the proceedings were not recorded, whether the function of the grand jury was thereby abused.

VII

Whether petitioner was deprived of a fair trial after the trial Court told the jury panel on voir dire examination that a crime had been committed.

VIII

Whether petitioner was unduly restricted in his cross-examination of Agent Clark concerning the suspension of Officer Flynn who had participated in the investigation of this matter.

IX

Whether Exhibit 4 was erroneously admitted into evidence because it was obtained as a result of an unreasonable and illegal arrest, search and seizure.

X

Whether the Court erred in permitting government exhibits to be displayed to the jury after petitioner rested and in sending the exhibits to the jury room at the commencement of deliberations.

XI

Whether petitioner was entitled to inspect a presentence investigation report apparently containing derogatory information.

XII

Whether numerous errors, each claimed to be harmless, combined together to deprive petitioner of a fair trial and due process of law.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States

IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of the United States Title 21, United States Code

Section 321(v)(2)

For the purposes of this chapter . . .

(v) The term "depressant or stimulant drug" means . . .

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any

salt of amphetamine or any salt of any optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; . . .

Section 331(q)(2)

The following acts and the causing thereof are prohibited; . . . the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this title; . . .

Section 360a(b)

No person, other than—

(1) a person described in subsection (a) of this section, while such person is acting in the ordinary and authorized course of his business, profession, occupation, or employment . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person.

Title 28, United States Code

Section 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rules of Criminal Procedure

Rule 32(c)

(c) Presentence Investigation

(1) When Made. The probation service of the court shall make a presentence investigation and

report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

Rule 52(a)

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Petitioner, Charles Schrenzel, was convicted on a four-count indictment (A. 6-7), charging him with violations of Section 331(q) (2), Title 21, United States Code, in that on the separate dates specified in each count he "did willfully, knowingly and unlawfully, sell and deliver" a certain number of capsules or tablets of "a stimulant drug within the meaning of Section 321(v)(2), Title 21, United States Code." The four counts charged sales and dates as follows:

> Count One, January 26, 1971—400 capsules containing combination of d and dl-amphetamine sulphate;
>
> Count Two, January 18, 1971—200 tablets methamphetamine hydrochloride;
>
> Count Three, January 16, 1971—100 tablets methamphetamine hydrochloride;
>
> Count Four, January 14, 1971—100 tablets methamphetamine hydrochloride.

After pleading not guilty, petitioner filed a number of pre-trial motions which were heard by the Court on March 19, 1971. The motions attacked the indictment, sought a transfer of the cause, and generally related to pre-trial discovery matters. For the most part, the Court overruled the motions, and the Court's rulings on several of the motions are some of the issues presented for review in this petition. The details of the motions and the issues presented are more fully developed in the portion of this petition on the reasons for granting the writ of certiorari.

On April 12, 1971, the cause was called for trial. Petitioner announced not ready and requested a continuance (A. 36). This request was denied, and the trial commenced

with the impaneling of the jury (A. 43). During the voir dire examination of prospective jurors, one juror, Mrs. Alsop, was excused for cause (A. 43-47). In attempting to clarify her bewilderment over being excused, the Court referred to "the city in which the crime occurred" (A. 47). A defense motion for mistrial (A. 47) was overruled (A. 48).

There was a sharp conflict in the testimony concerning the alleged offense. The government called three witnesses, Special Agent William M. Clark of the Bureau of Narcotics and Dangerous Drugs, Department of Justice, Officer Darrell Ruediger, a police officer assigned to the Narcotics Section of the St. Louis Police Department,[2] and Ferris H. VanSickle, a chemist in the Chicago Regional Laboratory of the Bureau of Narcotics and Dangerous Drugs. In addition, the government introduced into evidence bottles of tablets and capsules allegedly purchased from petitioner on the four dates mentioned in the indictment. Petitioner's only evidence consisted of his own testimony.

The evidence in behalf of the government tended to show the following: on January 14, 1971, Officer Ruediger and Agent Clark entered the Teich Pharmacy in Bellefontaine Neighbors, St. Louis County, where petitioner was the manager (A. 49-50, 63-64). Officer Ruediger had previously been acquainted with petitioner and was known to petitioner as Ken. He introduced Agent Clark as his brother, Bill (A. 50, 64). They were dressed casually, in-

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[2] The offenses charged in the indictment are alleged to have occurred in the **County** of St. Louis. Officer Ruediger was an officer of the **City** of St. Louis. The County and City are separate jurisdictions and have separate police departments. Thus Officer Ruediger did not have general police powers in St. Louis County. See § 84.090, Revised Statutes of Missouri, 1969, setting forth police duties and powers "within the boundaries" of the City.

cluding a mustache on Agent Clark and a beard on Officer Ruediger (A. 50). Officer Ruediger asked petitioner for some Desoxyn and they were told to contact petitioner later (A. 51, 64). Later that afternoon, Officer Ruediger called petitioner (A. 65), and then Agent Clark returned to the pharmacy alone and purchased a bottle of Desoxyn, Plaintiff's Exhibit 1, which contained 100 tablets and for which he paid $20.00 (A. 51-52).

On January 16 Agent Clark and Detective Ruediger both returned and again purchased a bottle of Desoxyn, Exhibit 2, for $20.00 (A. 52-53, 66-67). At that time the officers asked petitioner for more drugs, saying that they were in the drug trafficking business, but petitioner stated that was all he could get (A. 53, 67).

On January 18 Agent Clark returned alone to the pharmacy and purchased two bottles of Desoxyn, Exhibit 3, for two $20 bills (A. 53-54). Later that afternoon Agent Clark phoned petitioner at the pharmacy and attempted to make arrangements to purchase other drugs which he said he could dispose of at truck stops and college fraternity houses. Petitioner indicated that he could obtain some of these additional drugs and powders and suggested that Agent Clark call back later and be willing to invest his life savings for the drugs which petitioner would obtain (A. 54-56).

On January 26, 1971, Agent Clark and Detective Ruediger returned to the pharmacy. Petitioner said he had some Biphetamine and handed Agent Clark a bottle, Exhibit 4, containing 400 capsules. After they haggled over the price, Agent Clark identified himself and arrested petitioner (A. 57, 67-68). On cross-examination Agent Clark acknowledged that he had intended to arrest petitioner on January 26, but did not pay any money at that time and did not have any marked money with him. The

purchases on January 14, 16 and 18 were with marked money, but the officers never recovered any of the marked bills (A. 61-62).

Agent Clark had no prescriptions for any of the four purchases and none was requested (A. 58).

After Agent Clark had secured the various exhibits, he forwarded them to the Chicago Regional Laboratory of the Bureau of Narcotics and Dangerous Drugs where they were analyzed by Mr. VanSickle. The results of his tests were as follows: Exhibits 1, 2 and 3 contained dl-methamphetamine hydrochloride, commercially known as Desoxyn, which is a hydrochloride salt of methamphetamine (A. 70). Exhibit 4 contained d and dl-amphetamine, commercially known as Biphetamine, which is a mixture of the optical isomers of amphetamine containing d and dl (A. 71).

On cross-examination Mr. Van Sickle acknowledged that all of the Desoxyn had the same lot number but that Exhibit 1 tested at 12.2 milligrams per tablet by weight, Exhibit 2 was 14 milligrams, and Exhibit 3 was 14.8 milligrams, the discrepancy apparently being the result of an inaccuracy in his test (A. 71-72). He also acknowledged that as to Exhibit 4 his report did not show d-amphetamine but just dl-amphetamine (A. 72-74).

In his testimony petitioner acknowledged that he was familiar with Desoxyn which is used for weight reduction and is sold to the public at twenty cents per tablet (A. 78). Biphetamine is also used for weight reducing and sells for twenty cents a capsule (A. 78). He denied having seen the particular bottles of Desoxyn which were introduced in evidence, although he had seen some similar bottles in the store (A. 78). He saw the bottle of Biphetamine when Agent Clark arrested him and then seized the bottle from the prescription counter where petitioner had placed it for the purpose of returning it to the whole-

saler (A. 78-79). The first time he ever saw Agent Clark was the date of his arrest, and he denied selling any of the tablets or capsules to either of the officers on the dates mentioned in the indictment (A. 79-80).

At the close of all the evidence the Court overruled petitioner's motion for judgment of acquittal (A. 81). Thereafter, the government, over petitioner's objection, was permitted to display the exhibits to the jury after a lengthy recess and just before the final arguments, and the Court also indicated an intention to send the exhibits to the jury room without a request from the jury (A. 82-84).

The cause was submitted to the jury after arguments and the Court's charge to the jury, to which petitioner made certain objections. The jury returned a verdict finding petitioner guilty on each count (A. 31-32). Petitioner's motion for judgment of acquittal, or, in the alternative, motion for a new trial, was presented and overruled on April 23, 1971 (A. 33). At the same time petitioner requested an opportunity to examine the presentence investigation report (A. 32-33). At the sentencing on April 30, 1971, petitioner renewed his request for permission to examine the presentence investigation report, but the request was denied (A. 33-34).

The Court sentenced petitioner on Count 1 to pay a fine of $5,000.00, on Count 2 to imprisonment for five years, on Count 3 to imprisonment for five years, and on Count 4 to imprisonment for five years, Counts 2 and 3 to run concurrently and Count 4 to be consecutive to the sentence imposed on Counts 2 and 3, the combined effect being a fine of $5,000.00 and ten years imprisonment (A. 34).

Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit (A. 35). The appeal was argued on November 16, 1971. On June 28, 1972, in an opinion (Appendix A) written by District

Judge Van Pelt and concurred in by Circuit Judge Gibson, petitioner's conviction was affirmed. Circuit Judge Heaney filed a separate opinion in which he concurred in the judgment of conviction, but he dissented from that portion of the opinion affirming the trial court's denial of an opportunity to petitioner to inspect the presentence investigation report. Judge Heaney suggested "that this case presents an appropriate opportunity to fully reexamine our position relating to the disclosure of presentence reports."

Petitioner's timely petition for rehearing en banc or, in the alternative, for rehearing was overruled. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioner's conviction and sentencing.

REASONS FOR GRANTING THE WRIT

I

Submissible Case (Variance)

We believe that the evidence does not sustain the conviction because the government failed to make a submissible case as to the specific allegations of each count of the indictment; the evidence fatally varied from the charge. The motions for judgment of acquittal which petitioner filed at the close of the government's case and also at the close of the entire case (A. 81) should have been sustained, and petitioner should have been discharged.

Petitioner was charged with four violations of Section 331(q)(2) of Title 21, United States Code. The statutes involved were substantially amended, prior to petitioner's indictment, by Public Law 91-513, adopted on October 27, 1970, and known as the "Comprehensive Drug Abuse Prevention and Control Act". The repeal of Section 331(q)(2) was, however, not effective until May 1, 1971, after the alleged offenses herein. But certain other provisions of the old law were repealed effective October 27, 1970. See Section 704 of the Comprehensive Act.[3]

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[3] It is interesting to note that although the government apparently contends that the charge against petitioner was based entirely upon the law prior to repeal, nevertheless they did attempt to conduct a search in accordance with Section 510 of the new 1970 Law. Also, we seriously question whether the term "depressant or stimulant drug" continued to exist subsequent to the enactment of the 1970 Law. In Section 102 (9) of the new law (21 U.S.C., § 802 (9) as renumbered) the new term, "depressant or stimulant substance," is defined. The new definitions do not include "depressant or stimulant drug". By the provisions of Section 704 (b) of the new law which sets forth effective dates, the definition of the term "depressant or stimulant substance" became effective immediately on October 27, 1970. Thus it would appear that there was not at the time of the alleged offenses herein any such thing as a "depressant or stimulant drug." To indict and instruct for an offense relating to a "stimulant drug" was error.

Section 331 (q)(2) of Title 21, United States Code, provided:

> "The following acts and the causing thereof are prohibited; . . . the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this title; . . ."

Section 360a(b) of Title 21, United States Code, provided:

> "No person, other than—
>
> (1) a person described in subsection (a) of this section, while such person is acting in the ordinary and authorized course of his business, profession, occupation, or employment . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person."

Section 321 of Title 21, United States Code, provided:

> "For the purposes of this chapter . . .
>
> (v) The term 'depressent or stimulant drug' means . . .
>
> (2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of any optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; . . ."

In order to determine whether a submissible case was made under these statutes, it would be appropriate to analyze the indictment, proof and instructions as to each alleged offense:

Count 1

Count 1 charged a sale on January 26, 1971, of 400 capsules "containing a combination of d and dl-amphetamine sulphate, a stimulant drug". Exhibit 4 was the bottle of 400 Biphetamine capsules allegedly purchased. Mr. VanSickle testified that "the results of my analysis showed the contents of this bottle (Exhibit 4) to contain capsules that contained d and dl-amphetamine, commercially known as Biphetamine." He testified that Biphetamine is a mixture of the optical isomers; it contains d and dl and these are optical isomers of amphetamine (A. 71). On cross-examination he acknowledged that his report of the results of his analysis only showed dl-amphetamine (A. 72). The government's position instruction was that the exhibit contained dl-amphetamine sulphate (A. 29), and the verdict-directing instruction related to dl-amphetamine sulphate (A. 29-30).

Thus as to Count 1 the charge was that the capsule contained d and dl-amphetamine sulphate. The government's proof was that it contained dl-amphetamine (no mention of d or sulphate). The government's instructions related to dl-amphetamine sulphate (no mention of d amphetamine sulphate).

There was nothing in the evidence to indicate that a capsule containing a combination of d and dl-amphetamine sulphate (as charged) is the same as a dl-amphetamine capsule (as proved) or a dl-amphetamine sulphate capsule (as instructed). And there was no evidence that sale of a capsule containing a combination of d and dl-amphetamine sulphate was prohibited. Thus the government failed to prove the charge of Count 1.

It is true that in the definition of "depressant or stimulant drug" in the Court's instructions, there was a refer-

ence to any drug which contains any quantity of amphetamine or any of its optical isomers (A. 28). However, in the confusion of Mr. VanSickle's testimony, it is not clear that the Biphetamine was an amphetamine or any of its optical isomers. Even if the Biphetamine could be held under his testimony to have been an optical isomer of amphetamine, nevertheless, the charge was d and dl-amphetamine sulphate and he only found dl-amphetamine.

Count 2

Count 2 charged a sale on January 18, 1971, of 200 tablets of methamphetamine hydrochloride, a stimulant drug. Exhibit 3 were the two bottles of tablets allegedly purchased. The results of the test by Mr. VanSickle "showed the contents of the two bottles to contain tablets that were dl-methamphetamine hydrochloride, commercially known as Desoxyn" (A. 70). The government's position instruction was that the exhibit contained dl-methamphetamine hydrochloride (A. 29), and the verdict-directing instruction related to dl-methamphetamine hydrochloride (A. 29).

Count 3

Count 3 charged a sale on January 16, 1971, of 100 tablets of methamphetamine hydrochloride, a stimulant drug. Exhibit 2 was the bottle of tablets allegedly purchased. The results of Mr. VanSickle's analysis "showed that the tablets in Government's Exhibit 2 to contain dl-methamphetamine hydrochloride, commercially known as Desoxyn" (A. 70). The government's position instruction was that the exhibit contained dl-methamphetamine hydrochloride (A. 29), and the verdict-directing instruction related to dl-methamphetamine hydrochloride (A. 30).

Count 4

Count 4 charged a sale on January 14, 1971, of 100 tablets of methamphetamine hydrochloride, a stimulant drug. Exhibit 1 was the bottle of tablets allegedly purchased. Mr. VanSickle's analysis "showed that the tablets in Exhibit 1 contained dl-methamphetamine hydrochloride, commercially known as Desoxyn" (A. 70). The government's position instruction was that the exhibit contained dl-methamphetamine hydrochloride (A. 29), and the verdict-directing instruction related to dl-methamphetamine hydrochloride (A. 30).

Thus as to each of Counts 2, 3, and 4 the charge was that the tablet was methamphetamine hydrochloride. The evidence and instructions were that it was dl-methamphetamine hydrochloride. There was no evidence that dl-methamphetamine hydrochloride was the same as methamphetamine hydrochloride. There was thus a total failure of proof of the offenses charged in Counts 2, 3 and 4.

It is true that the Court instructed, based upon Regulation Section 166.3 that the Commissioner designated for the prohibited list "d-dl-methamphetamine and their salts" (A. 28). The evidence of Mr. VanSickle apparently was that the Desoxyn was dl-methamphetamine hydrochloride which he said was a hydrochloride salt of methamphetamine, but there was no showing that this was the same as the d-dl-methamphetamine on the regulation list, or that it was the same as the methamphetamine hydrochloride listed in the indictment.

We submit that the government introduced a most confusing set of circumstances which did not substantiate the charges laid in the counts of the indictment. There was a variance between the indictment and the proof.

The leading case on variance is **Ex parte Bain**, 121 U.S. 1, which held that an indictment may not be amended

except by the grand jury. In **Stirone v. United States**, 361 U. S. 212, this Court said (l. c. 217-218):

> "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. . . . While there was a variance (in the Stirone case) in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

Equally invalid is to subject "the defendant to prosecution for sale of a drug which the grand jury did not charge."

The Court of Appeals recognized the conflict between its opinion and that of the Fifth Circuit in **Guilbeau v. United States**, 5 Cir., 288 F. 731, suggesting that **Guilbeau** has been overruled in effect by **Berger v. United States**, 295 U. S. 78, and Rule 52(a) of the Federal Rules of Criminal Procedure. **Berger** did not expressly overrule **Guilbeau** (for **Guilbeau** is not even mentioned in **Berger**), and we believe that this Court did not even inferentially overrule **Guilbeau** in **Berger**. Furthermore, the effect of **Berger**

has been severely limited by **Kotteakos v. United States**, 328 U. S. 750.

Other cases cited in the opinion of the Eighth Circuit herein as casting doubt on the vitality of **Guilbeau** are not appropriate. For example, in **McIntosh v. United States**, 7 Cir., 1 F. 2d 427, cited in fn. 1 of the opinion, there was apparently proof as to the physical characteristics and similarities between the drugs charged and proved—but there was no proof in the instant case as to any characteristics, appearance, effect or composition of any of the drugs charged or proved.[4] In **Cromer v. United States**, D. C. Cir., 142 F. 2d 697, the variance was only as to amount of drugs, not substance.

In the recent case of **Jiminez v. Florida**, Fla., 231 So. 2d 26, the **Guilbeau** case is cited with approval in holding that there was a fatal variance in a charge of heroin and proof of morphine, even though both are derivatives of opium.

We submit that there was indeed a fatal variance between the charge and the proof in the instant case. The opinion of the Court of Appeals for the Eighth Circuit is in conflict with that of the Court of Appeals for the Fifth

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[4] In the instant case, the Court of Appeals held as to Count 1 that "the failure to include testimony as to whether it was a salt was harmless error." The Court apparently concluded, without proof, that a sulphate is a salt of amphetamine. Although a sulphate is defined by the dictionary as a salt of sulphuric acid, it cannot be assumed that it is a salt of amphetamine under the statute. Such a conclusion must be based upon expert evidence. It cannot be "harmless error" where there is actually no proof at all. Cf. Question XII of this petition.

Similarly as to Counts 2, 3 and 4 there was no proof that methamphetamine hydrochloride (as charged) was the same as dl-methamphetamine hydrochloride (as proved). The fact that the grand jury in its indictment may have been guided by the manufacturer's label (without "dl") cannot avoid the conclusion that the proof from the chemist showed a different substance.

Circuit in **Guilbeau** and with the opinion of the District Court of Appeal of Florida in **Jiminez**. In addition, the opinion herein seemingly misinterprets Rule 52 (a) of the Federal Rules of Criminal Procedure as well as this Court's decisions in such cases as **Berger** and **Kotteakos**.

Because of the importance of this issue of variance and the need to clarify prior decisions and because of the conflict which exists among lower courts, we respectfully suggest that certiorari should be granted as to this question.

II

Instructions

A. In the instructions to the jury, the trial Court stated "the charge against the defendant is in four counts," and proceeded to read each count of the indictment. The Court then stated that each count was a separate offense and should be considered separately (A. 25-27). Then after identifying the applicable law, the Court gave the government's position instruction, again in four separate paragraphs, one for each count. Then the Court gave verdict-directing instructions for the government, again in four separate paragraphs (A. 29-30). As pointed out elsewhere in this petition (see Question III), we believe that the inclusions of four separate counts was erroneous. The quadruple repetition in three different places in the instructions emphasized the error. There was, if at all, only one offense, and it should have been instructed as one offense.

B. In quoting the law, the Court's charge referred to and defined a "depressant or stimulant drug" (A. 28). As noted elsewhere in this petition (see fn. 3), we contend that the term "depressant or stimulant drug" was not in existence at the time of the alleged offense, but that

by the amendment effective October 27, 1970, the only relevant term was "depressant or stimulant substance" as defined in § 102(9) of the Comprehensive Drug Abuse Prevention and Control Act. For its failure to use the language of the statute which became effective prior to the alleged offenses, the trial Court committed error. The opinion of the Court of Appeals seemingly acknowledges the error, but holds that the interchange of "drug" and "substance" was not reversible error. We believe that the departure from the statute was prejudicial.

C. The Court's charge defined the term "depressant or stimulant drug," as including, within the provisions of sub-section (c) of 21 U.S.C., § 321(v), any substance which the **Secretary** has found to be habit forming (A. 28). The term "depressant or stimulant substance," as defined in § 102(9) of the 1970 law, requires a finding by the **Attorney General** that the substance is habit forming. But irrespective of whether it is a Secretary or an Attorney General who must make the finding, there was no evidence that either official had so found. Instead, the only conceivable evidence could be the Court's judicial notice of C.F.R., Section 166.3 (A. 28), but the regulation is defined in terms of the **Commissioner** making the finding. Nowhere in the evidence or in the instructions was there any clarification of who the "Commissioner" might be. Certainly, he was not shown to be either the "Secretary" or the "Attorney General". Because there was no evidence to support a charge that a mysterious Commissioner was authorized to make the finding within the terms of the law, the inclusion of a finding by an otherwise unidentified Commissioner was an erroneous charge. Furthermore, a serious constitutional question exists as to the delegation of the power to designate proscribed stimulant drugs: may a public official be authorized to create and define the elements of a crime; is that not the function of the legislature?

D. The trial Court also instructed the jury: "You will further observe that amphetamine drugs are one of the depressant or stimulant drugs, the sale of which is prohibited unless done in this manner" (A. 29). The use of the catch-all phrase "amphetamine drugs" without relationship to d and dl-amphetamine sulphate or methamphetamine hydrochloride as charged in the indictment or to the various combinations in evidence was erroneous. Petitioner was not charged with the sale of an "amphetamine drug." In effect, what the Court did was to say that anything containing the word "amphetamine" would be a proscribed drug. This is not what the statute or the regulations say. Thus the Court, for all practical purposes, directed a verdict of guilty. See **Brotherhood of Carpenters and Joiners of America v. United States**, 330 U.S. 395, 408.

E. The changes in the instructions from d and dl-amphetamine sulphate and methamphetamine hydrochloride as alleged in the indictment to dl-amphetamine sulphate and dl-methamphetamine hydrochloride in the instructions was an erroneous variance, as noted elsewhere in this petition (see Question I). The instructions were erroneous in varying from the indictment and the evidence. This error was compounded in the position and verdict-directing instructions given on behalf of the government (A. 29-30).

Because of the errors in the instructions of the District Court which were sanctioned by the Court of Appeals and because these errors permitted a conviction violative of the terms of the statute and contrary to principles heretofore decided by this Court pertaining to the administration of federal criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

III

Multiple Counts

The indictment (A. 6-7) contained four separate counts, each charging petitioner with a violation of Section 331 (q)(2) of Title 21, United States Code. The counts (in inverse order) charged offenses on January 14, 16, 18 and 26, 1971. Each charged a separate sale of a stimulant drug. According to the government's bill of particulars, each sale was to federal agent Clark, but Officer Ruediger "was present" or "participated" in two of them. Each alleged sale took place in the Teich Pharmacy in Bellefontaine Neighbors.

The government's evidence indicated that Agent Clark was the purchaser on each of the four dates alleged in the indictment. It was clear that the purchases were part of a continuing transaction during which there were also discussions as to the availability of additional quantities and types of drugs. The discussions culminated in deliveries on four separate dates, but it was, if true, all part of one transaction.

We believe that under these circumstances it was improper to charge, convict and sentence petitioner separately on each count. If he was guilty of an offense, it was one continuing offense. For the government to split it into separate segments, to be terminated only after the government arbitrarily decided that they had sufficient offenses for separate sentences, approached the point of double jeopardy prohibited by the Fifth Amendment and cruel and unusual punishment condemned by the Eighth Amendment to the Constitution of the United States. If the government may terminate the sales and, therefore, the number of counts after four, they could have continued until 40 or 400. And if the government may charge in separate counts for each sale, then why

could they not charge in two counts for the alleged sale on January 18th when two separate bottles were purchased, or even in 100 separate counts for January 14, 100 counts for January 16, 200 counts for January 18, and 400 counts for January 26, merely by breaking the entire transaction down to the individual number of tablets transferred on each date.

The error was further compounded when the Court imposed separate consecutive sentences for separate counts. Petitioner received a fine of $5,000.00 on Count 1 and additional concurrent sentences of five years each on Counts 2 and 3. Count 4 was a consecutive sentence of five years for a total of ten years (A. 34). The combined sentence was therefore far in excess of the maximum that is permitted under the statute for a single conviction.

In **Whitton v. Alaska,** 479 P. 2d 302, the Supreme Court of Alaska had occasion to discuss the various problems and tests inherent in this issue. That case would find the procedure employed in the instant case to be violative of double jeopardy and Eighth Amendment principles.

In **Gebhard v. United States,** 9 Cir., 422 F. 2d 281, the Court was confronted with repetitious perjury counts and held (l.c. 289-290) that it was not proper for the government to "bludgeon a witness who is lying by repeating and rephrasing the same question, thus creating more possible perjury counts." The Court concluded (l.c. 290):

> "We are of the opinion that only one count in each of these groups should be allowed to stand. Otherwise a prosecutor could run up a possible perjury sentence indefinitely merely by repeating the same question. Single punishment for a single lie should suffice."

By the same reasoning, "only one count in (the instant case) should be allowed to stand. Otherwise a prosecutor

could run up a possible (stimulant drug) sentence indefinitely merely by repeating the same (sale). Single punishment for a single (transaction) should suffice." See also **Yates v. United States**, 355 U.S. 66, where this Court held only one contempt for numerous refusals to answer separate questions on two dates. Cf. American Bar Association Standards of Criminal Justice Relating to Sentencing Alternatives and Procedures, Sec. 3.4.

In the leading case of **Bell v. United States**, 349 U.S. 81, this Court considered the multiplicity question involved in a two-count Mann Act prosecution for transportation of two women on the same trip. The Court, speaking through Mr. Justice Frankfurter, decided that a clear congressional intent must be evident before multiple prosecutions may be sanctioned, and concluded (l.c. 83-84):

> "(A)mbiguity should be resolved in favor of lenity, . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . (I)f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, . . ."

The instant case is not a situation where separate statutes cover different aspects of a transaction, as in **Gore v. United States**, 357 U.S. 386. Instead the same statute is applied four times to one continuing transaction. See also **Prince v. United States**, 352 U.S. 322. Nor is **Harris v. United States**, 8 Cir., 237 F. 2d 274, which was cited by the trial court (A. 19) and the Court of Appeals, applicable. Harris was charged with different substantive violations; petitioner here was charged with the same substantive offense except on different dates. Here then was evidence of continuous negotiations for a continuous business transaction.

For the foregoing reasons, we believe the trial Court erred in permitting this case to be tried as four separate offenses. Petitioner's motion to require the government to elect (A. 12) should have been granted so as to protect against violations of the Fifth and Eighth Amendments. This case should have proceeded, if at all, on one count only. To try petitioner and sentence him otherwise was error.

Because of the conflict with basic constitutional principles and with decisions of this Court, we respectfully suggest that certiorari should be granted as to this Question.

IV

State v. Federal Jurisdiction

Petitioner argued in the courts below that the offenses with which he was charged were also state offenses and that he was entitled to a hearing to determine which jurisdiction might proceed against him. His arguments were rejected, the opinion of the Court of Appeals stating:

> "Appellant argues that the trial court was in error when it refused to transfer the case to the state court. He claims he had certain rights in the state court, such as the opportunity to take the depositions of law enforcement officers on certain matters which were not available to him in federal court. This argument was expressly rejected by this court in **Caton v. United States**, 407 F. 2d 367, 376 (8th Cir.), cert. denied, 395 U.S. 984 (1969). Appellant has set forth no reason which would persuade us to overrule that decision."

In **Caton**, the defendant contended "that he was deprived of due process of law by the alleged 'arbitrary' transfer by the (state law enforcement official) of his per-

son to the jurisdiction of the federal authorities without a judicial hearing to determine the proper forum." The defendant there argued that by the arbitrary transfer to federal authorities, he was deprived of certain pre-trial, trial and post-trial rights which he is not accorded in a federal trial. In rejecting this contention, the Court of Appeals stated in the **Caton** case:

> "We find no merit in the argument. The short answer to the defendant's contention is that he could be tried by both sovereignties. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). The defendant has no right to a hearing to determine which, if either, shall try him first."

We believe that the **Caton** case was erroneously decided and that its application by the Court below to the instant case should be reviewed by this Court, for the following reasons:

1. The reliance by the Eighth Circuit upon the cases of **Abbate v. United States**, 359 U.S. 187, and **Bartkus v. Illinois**, 359 U.S. 121, is misplaced. We believe that both sovereignties may not try petitioner, as a result of this Court's holdings in **Waller v. Florida**, 397 U.S. 387, and **Ashe v. Swenson**, 397 U.S. 436. Cf. **O'Callahan v. Parker**, 395 U.S. 258. See also **Commonwealth of Pennsylvania v. Mills**, Pa., 286 A.2d 638.

2. In the State of Missouri, a defendant is entitled to many greater rights than he is accorded in a federal criminal trial. Among others, the state defendant almost always receives a preliminary hearing, is furnished with a list of prosecution witnesses, may take pre-trial discovery depositions, may "plea bargain" with the prosecutor, has a more representative jury, and is entitled to have his punishment assessed by the jury rather than the Court. Presentence investigation reports are customarily made avail-

able to the defense. Because of the broader scope of pretrial discovery in the state proceeding and because of other differences in procedure between the state and federal jurisdictions, it would have been advantagous to petitioner to have been tried in the state courts. To arbitrarily decide that he is to be tried in the federal system, without even a hearing as to which forum shall assume jurisdiction, deprives a defendant of his right to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The particular facts in the instant case show a deliberate effort by the government not only to bypass state criminal procedures but to prevent petitioner from making use of certain discovery proceedings available to him under local procedural guidelines. At the commencement of the trial, petitioner requested a continuance because of what had taken place in a state proceeding. After reminding the Court of the motion to transfer to state authorities (A. 11), petitioner explained that, subsequent to the pretrial hearing, he had received notice of a proceeding to revoke his license as a pharmacist filed by the Missouri State Board of Pharmacy before the Administrative Hearing Commissioner of the State of Missouri. Pursuant to the rules of the Administrative Hearing Commission, petitioner served a notice to take depositions in that proceeding on the Attorney General of Missouri. The depositions were schedules for April 2, 1971. In connection with the depositions, subpoenae duces tecum were served upon federal and local law enforcement officers, but at the request of the United States Attorney's Office, the Missouri Attorney General dismissed the revocation proceedings (without prejudice) before the depositions could be taken (A. 38-41).

Thus petitioner was deprived of his opportunity to take the depositions of the law enforcement officers on matters

which were relevant not only to the revocation proceedings but also to this case. It was a method of investigation and pre-trial discovery permitted under local statutes and rules, but solely because of the action of the United States Attorney, petitioner was deprived of these procedural opportunities. It is interesting to note that there was no denial by the United States Attorney of petitioner's complaint that the United States Attorney had prevailed upon the state authorities to dismiss the administrative proceedings. This was certainly not the type of "cooperation" contemplated by 21 U.S.C., §873(a)(2) (§503 of the Comprehensive Drug Abuse Prevention and Control Act) which authorizes the Attorney General to "cooperate in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States."

We submit that the interference by the United States Attorney deprived petitioner of basic Sixth Amendment constitutional rights of preparation and defense.

4. At the pre-trial hearing on the motion to transfer to the state authorities, petitioner called attention to 21 U.S.C., § 903 (§ 708 of the Comprehensive Drug Abuse Prevention and Control Act) which provides:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

Petitioner believes that this section permits his prosecution only according to state law as long as there is a state

statute which sufficiently covers the acts charged. The subject of stimulant drugs and their control and of prosecution for violations is adequately covered by Sections 195.220 through 195.270 of the Revised Statutes of Missouri. Had this prosecution been brought in the state courts, petitioner would have been entitled to pre-trial discovery and other trial rights far superior to that available under the Federal Rules of Criminal Procedure.

Because the Courts below erred in permitting this prosecution to proceed in the federal courts in violation of petitioner's constitutional rights and because of conflict with principles decided by this Court and because of the importance of this issue in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

V

Continuance

On March 19, 1971, various pre-trial motions filed by petitioner were argued in the District Court. Some were overruled and some were taken under submission (A. 22-23). Among the motions submitted was one under Rule 16 of the Federal Rules of Criminal Procedure for discovery and inspection (A. 13-15) which requested an opportunity to inspect tangible objects in the possession of the government.

Although trial was set for April 12, 1971, the Court's ruling on the motion for discovery and inspection was not made until April 8, 1971,[5] the order being that the

[5] It is interesting to note that the copy of the Court order given to petitioner was file-stamped by the Clerk's office at 5:30 P.M. on April 8, 1971; a copy actually was not given to defense counsel until the close of the first day of the trial on April 12 (A. 75).

motion was "overruled without prejudice as to tangible evidence pending a meeting by attorney for defendant with United States Attorney handling the case for examination of such information as will be furnished after which leave is granted to file any additional motions applicable thereto; and said motion (is) overruled in all other particulars without prejudice to refile at the proper time" (A. 22).

Before this ruling, defense counsel had received a copy of the lab reports from the government attorney, but there had been no opportunity to inspect the bottles of drugs which were the subject of the prosecution. The reason given by the government was that they had not arrived until April 12th, the morning of the trial (A. 36). Petitioner requested a continuance of the trial in order to make an inspection, but the Court merely granted a period of less than an hour to inspect, while the Court took care of other business (A. 38).

The government's suggestion that petitioner could not have seen the bottles of drugs prior to the date of trial because they were in Chicago and were not brought by the chemist until the date of trial (A. 38) is not a satisfactory answer to petitioner's request. Certainly, the government knew that these tangible objects would be introduced in evidence; they were in the custody of the government, even though in Chicago, and it would have been a simple matter for the government to have had them sent to St. Louis prior to trial for inspection under Rule 16.

After a hurried inspection was made, it became obvious to defense counsel that further investigation was necessary. In view of the nature of the defense, which denied any prior knowledge of the sales, petitioner should have had an opportunity to make an effort to locate the actual source of the bottles of drugs produced by Agent Clark.

Petitioner mentioned lot numbers which appeared on the bottles (A. 42-43); these were a lead to tracing the source of the bottles in the government's possession.

To give the right of inspection provided by Rule 16 on the morning of trial and then to deny an opportunity for further investigation as a result of what the inspection revealed violates the spirit of both Rule 16 and the Sixth Amendment right to have process for witnesses. The trial Court certainly did not assist petitioner in any respect, because the rulings were not made until the end of the week before trial commenced and defense counsel was not furnished with a copy of the rulings until after the first day of trial (A. 75).

The Court of Appeals held that there was no abuse of discretion in denying petitioner's request for a continuance based upon the delay in inspection, stating that "defendant's attorney did not indicate at any time prior to trial that he wished to see the actual drugs or their bottles." The Court was in error, for petitioner did indeed make a request on March 8, 1971, for such inspection in his Motion for Discovery and Inspection (A. 13-14). See paragraph 2 in particular. The trial Court was well aware of the request, as is obvious from the order of April 8, 1971, ruling on the Motion for Discovery and Inspection (A. 22). Unfortunately, petitioner was not notified of the ruling in sufficient time to provide for meaningful inspection and investigation prior to trial.

A continuance may be contrary to the constitutional guarantee of a speedy trial, but inherent in the right to a speedy trial is an adequate opportunity to investigate prior to trial. Petitioner was entitled to inspect these tangible objects and then to investigate further. It is just not consistent with Fifth Amendment due process to permit the government to keep a defendant uninformed of the case until the trial is completed.

Because of the importance of this question in the administration of federal criminal justice, we respectfully suggest that certiorari should be granted as to this question.

VI

Grand Jury Proceedings

Among the pre-trial motions filed by petitioner were a motion for inspection and production of grand jury minutes and a motion for production of records of grand jury vote and voting procedure (A. 15-18). At the same time, petitioner filed a motion to dismiss the indictment (A. 7-9), paragraph 4 of which alleged that the indictment "was not based upon sufficient competent evidence having been presented before the Grand Jury returning the indictment." Implicit in this allegation is the suggestion that the evidence presented to the grand jury may well have been hearsay testimony alone. See also motion to quash indictment (A. 10).

The practice of using only hearsay evidence in presenting a matter to the grand jury, so as to deprive a defendant of his right to impeach by contradiction, has been frowned upon. **United States v. Arcuri**, 2 Cir., 405 F. 2d 691, and cases therein cited and analyzed. Of course, the only way to prove that hearsay was the sole foundation for the indictment would be by production of the grand jury minutes.

Another reason for production of the record of grand jury proceedings would be to determine whether proper procedure under Rule 6 of the Federal Rules of Criminal Procedure was followed in the grand jury room as to voting on each count of the indictment. See **Gaither v. United States**, D.C. Cir., 413 F. 2d 1061.

Assuming the indictment was actually founded upon more than hearsay and that the proper procedure was applied in the grand jury room, then the record of grand jury proceedings is necessary for the preparation of the defense and for use at the trial for impeachment of witnesses. Whether or not a showing of "particularized need" is still required (cf. **Dennis v. United States**, 384 U.S. 855), we believe that such a need existed here for production of the grand jury records because the witnesses were presumably (if there was no hearsay) the law enforcement officers who participated in the purchases and surveillance. In view of the direct contradiction of their testimony at the trial by petitioner, their grand jury testimony was essential for impeachment purposes. Also it was necessary prior to trial in order to apprise petitioner of the issues for which he was required to prepare. With all of the witnesses being law enforcement officers, there would not be the usual objection as to safety or secrecy of witnesses, etc. For cases questioning the necessity of showing particularized need and generally rejecting the secrecy argument in favor of making grand jury testimony available to the defense, see, for example, **United States v. Youngblood**, 2 Cir., 379 F. 2d 365, **Cargill v. United States**, 10 Cir., 381 F. 849, **Allen v. United States**, D.C. Cir., 390 F. 2d 476, and **Gibson v. United States**, D.C. Cir., 403 F. 2d 166.

Based upon the foregoing, we believe there was ample reason for the Court to have ordered the government to produce the record of grand jury proceedings. But, as indicated in the Court of Appeals opinion, there are apparently no grand jury minutes because the government did not record them. It is improper to permit the government to deprive petitioner of a copy of the minutes merely by failing to have a reporter present.[6] In this way, no

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[6] No doubt this is a method whereby the government attempts to circumvent the 1970 amendment to the Jencks Act (18 U.S.C., § 3500) requiring production of grand jury testimony.

safeguards can be applied by court supervision to insure that the grand jury functions according to its traditional purpose. Without such safeguards, the Fifth Amendment guarantee of indictment by grand jury is meaningless.

Because of the importance of determining whether the grand jury is being used by prosecutors in a manner contrary to its constitutional function, we respectfully suggest that certiorari should be granted as to this Question.

VII

Jury Panel

During the voir dire examination of the jury panel, counsel for petitioner asked whether any of the prospective jurors were related to any law enforcement official. It developed that one juror, Mrs. Alsop, had a son and brother on the police force of the City of Bellefontaine Neighbors. Government counsel acknowledged that the brother, a Sgt. Rogers, had "some connection" with the case against petitioner (A. 44-45). Petitioner's request that the juror be excused for cause was granted over the government's objection (A. 45-46).

When informed that she was excused, Mrs. Alsop was apparently puzzled and said "I had no idea what case was going to come up. Should I have volunteered that?" (A. 47). In the course of assuring Mrs. Alsop that she had done nothing improper, the Court made the following statement:

> "You have done nothing improper. The purpose of the question is to determine any possible interest, and in view of your statement that you have a brother who is on the police department **in the city in which the crime occurred**, we just don't want to have any possibility that in the course of the trial you might be embarrassed, or the defendant prejudiced, in any way by some testimony that might

come up that would put you on the spot, so we are just going to relieve you of that" (A. 47).

Defense counsel immediately called the Court's attention to the reference to the city in which the crime occurred as an indication that a crime was committed. After the Court had the Court's statement repeated by the court reporter out of the presence of the jury, petitioner moved for a mistrial (A. 47). The Court then attempted to correct the error by a further statement to the jury panel (A. 47-48), and overruled petitioner's motion for a mistrial (A. 48).

Petitioner does not contend that the Court's comment was anything other than inadvertent, but certainly the Court erred in assuming and making reference to the commission of a crime. It was an error of such magnitude that no instruction by the Court could overcome the prejudice. Cf. **Bruton v. United States**, 391 U. S. 123. Considering the importance that jurors attach to every word of the Court, especially during the initial stages of impaneling the jury, we believe that the presumption of prejudice is so strong that the only alternative for the Court should have been the discharge of the entire panel and the securing of another panel to hear the case.

The Court of Appeals held that this error was not prejudicial and was cured by the Court's immediate admonition and ultimate instructions. We feel, however, that as the incident occurred in the early stages of the trial when very little courtroom time had been consumed, any possibility of error could have been avoided by impaneling a new jury. This is not a case where an inadvertent slip occurs toward the end of a lengthy and strenuous trial; here, it was right at the outset. Petitioner was entitled to start the trial with a jury free of any prejudices or preconceived notions as to the commission of a crime.

It is important to bear in mind that the defense in this case was not based upon entrapment or any other affirmative defense which acknowledged that a crime had been committed. Instead, petitioner's defense was that no crime was committed by petitioner in the pharmacy located in the City of Bellefontaine Neighbors. When the Court positively stated that a crime had been committed, the defense obviously was at an insurmountable disadvantage.

As said by this Court in **Quercia v. United States**, 289 U.S. 466, 470:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' **Starr v. United States**, 153 U.S. 614, 626; **Hickory v. United States**, 160 U.S. 508, 421-423."

Because of the denial to petitioner of a fair trial free of error created by the Court's comment, we respectfully suggest that certiorari should be granted as to this Question.

VIII

Cross-Examination re Officer Flynn

At the conclusion of the direct examination of Agent Clark, the agent to whom petitioner allegedly made the four sales, counsel for the government furnished a Jencks statement of Agent Clark to defense counsel, under the

provisions of 18 U.S.C., § 3500. From the report, it became apparent that there were numerous other officers in the vicinity on the occasion of each sale, and defense counsel began his cross-examination of Agent Clark as to the identity and location of other officers. Agent Clark acknowledged that an officer, Richard Flynn, was present, but the government objected when he was asked if that was the same Officer Flynn who had recently been suspended (A. 58-59). There was a discussion out of the hearing of the jury concerning petitioner's desire to examine Agent Clark as to Officer Flynn, who, according to government counsel, was "in the St. Louis County Narcotics Squad" (A. 59).[7] The purpose of the cross-examination was to determine whether the suspension of Officer Flynn was connected in any way with the alleged sales by petitioner to Agent Clark, but the Court would not permit defense counsel to pursue this question (A. 58-60).

We believe the restrictions placed on cross-examination by the Court were prejudicially erroneous. The only evidence of sales came from Agent Clark and Officer Ruediger. The sales allegedly took place in St. Louis County, and Officer Flynn was an officer of St. Louis County. In view of the defense that there had been no sales, it was implicit that Agent Clark fabricated the story against petitioner. If another officer, having jurisdiction of the area in which the alleged offenses were supposed to have been committed, had been suspended because of his activities involving narcotics, certainly that would be relevant to show a motive on the part of the officers to point the finger of suspicion at an otherwise innocent pharmacist. Cf. **Hughes v. United States**, 9 Cir., 427 F. 2d 66, where it was error to restrict defendant's cross-examination efforts to establish that he had been "set up" by a government informer.

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[7] See fn. 2, supra.

The suggestion by counsel for the government that Officer Flynn was not going to testify and "doesn't come into the case at all" (A. 59) was merely a representation by the prosecutor which made it all the more important to determine whether his absence from court, as well as his participation in the investigation, was under suspicious circumstances. Had the jury known of Officer Flynn's participation in this case and subsequent suspension for involvement in illegal narcotics transactions, it could have raised a sufficient doubt in the jury's mind as to whether the officers were scheming to cover up Officer Flynn's, and perhaps Agent Clark's, misconduct in an effort to shift the spotlight of suspicion from themselves to petitioner. Thus petitioner was permitted only the vaguest speculation in his closing argument as to why he was on trial. Had he been permitted to complete his cross-examination of Agent Clark and perhaps to have called Officer Flynn as a witness,[8] the real background of this prosecution may have been developed at the trial and argued to the jury. Mere speculation apparently was not sufficient to create a doubt in the minds of the jury. Further cross-examination and evidence could have done so.

In deciding this issue against petitioner, the Court of Appeals relied upon the fact that "Officer Flynn was never called to testify and thus his credibility was never put at issue." This ruling begs the issue, for petitioner was not concerned only with attacking the credibility of Officer Flynn if he became a witness. Instead petitioner sought to suggest the existence of a motive for Officer Flynn, with the assistance of Agent Clark, to frame petitioner for a crime in which they, rather than he, were implicated.

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[8] Petitioner did not become aware of Officer Flynn's participation until the examination of the Jencks statement.

The evidence was relevant, and the cross-examination of the key government witness should have been permitted. The restriction deprived petitioner of his Sixth Amendment rights and was in conflict with the decision of the Ninth Circuit in **Hughes v. United States**, supra. For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

IX

Arrest, Search and Seizure

Special Agent Clark testified to purchases of bottles of Desoxyn from petitioner on January 14, 16 and 18, 1971. Thereafter another agent of the Bureau of Narcotics and Dangerous Drugs, using those sales as a basis, made application for an inspection warrant on January 25, 1971. The warrant was issued by the United States Magistrate, the specific grounds upon which the warrant was issued being the three sales by petitioner to Agent Clark.

Although Agent Clark testified that he intended to make an arrest on January 26 based upon the sale on January 26 (which obviously had not yet taken place when he walked into the pharmacy), he was of course aware of the earlier sales. He admitted that he did intend to make an arrest when he went to the pharmacy on January 26 (A. 62). At the pre-trial hearing Agent Clark testified that he knew that another officer had a warrant for a search or inspection. Presumably he was aware that there was probable cause for an arrest inasmuch as the search warrant had been issued by the Magistrate upon probable cause. Agent Winberg testified at the pre-trial hearing that after the inspection warrant had been issued by the Magistrate, but before it was executed, he knew that Agent Clark was going to attempt to make another purchase from petitioner on January 26.

We believe that the testimony of the purchase on January 26 and the evidence of what was seized (Exhibit 4) should not have been permitted for three basic reasons:

A. Agent Clark was not authorized to make an arrest without an arrest warrant because he had sufficient time to apply for such a warrant. Three sales had taken place by January 25, 1971. The agents knew they had sufficient probable cause for official action, especially after the Magistrate issued one warrant (an inspection warrant) based upon such sales. There was no reason why Agent Clark could not have applied for an arrest warrant to the same Magistrate. We believe the law requires a law enforcement officer to apply for a warrant, whether it be for a search or an arrest, where there is sufficient time to do so and there are no reasons justifying a failure to apply. See **Jones v. United States**, 357 U.S. 493, and **Chapman v. United States**, 365 U.S. 610. In **Chimel v. California**, 395 U.S. 752, this Court stated:

> "Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it. . . .' United States v. Jeffers, 342 U.S. 48, 51."

B. The search or inspection warrant having been issued, it should have been executed before the attempted purchase and new offense of January 26. Inasmuch as the warrant had been issued, there was in the minds of the narcotics agents sufficient basis to make an arrest of petitioner without the creation of any new offenses. We believe it is highly improper for law enforcement officers, having a basis for making an arrest, to withhold that action until they can precipitate another offense. Compare the analogous situation where there was delay in the execution of a search warrant, discussed in **Mitchell v. United States**, D.C. Cir., 258 F. 2d 435, **Spinelli v. United States**,

8 Cir., 382 F. 2d 871 (reversed on other grounds, 393 U.S. 410), **House v. United States**, D.C. Cir., 411 F. 2d 725, and **United States v. Bradley**, 5 Cir., 428 F. 2d 1013.

C. Petitioner should have been advised of his rights under **Miranda v. Arizona**, 384 U.S. 436. Inasmuch as probable cause existed for an arrest, the finger of suspicion was obviously pointed at petitioner and he should have been given the appropriate warnings under the **Miranda** decision. When the officer failed to do so, any acts and statements by petitioner subsequent to the officer's entry on January 26 were subject to suppression because in violation of the **Miranda** doctrine. The seizure of Exhibit 4 was contrary to the unreasonable search and seizure guarantees of the Fourth Amendment and the self-incrimination provisions of the Fifth Amendment.

Because of the conflicts with decisions of other Courts of Appeals and of this Court and because of the denial of basic constitutional rights relating to unreasonable arrests and seizures, we respectfully suggest that certiorari should be granted as to this Question.

X

Exhibits to Jury

In addition to the testimony of witnesses, the government's evidence consisted of Exhibits 1-4, four bottles of Desoxyn tablets and one bottle of Biphetamine capsules, all of which had allegedly been purchased from petitioner. They were identified by the law enforcement officers who testified for the government, referred to by the government chemist who examined them, and just prior to the close of the government's case were introduced and received in evidence (A. 74-75). After the Court announced to the jury that the exhibits had been received in evi-

dence, the government rested its case (A. 75). The Court then adjourned for the day, and on the next day, petitioner briefly testified. His testimony included denials that he had ever seen the bottles of Desoxyn and that he had sold any of the exhibits to Agent Clark (A. 78, 80-81).

Petitioner rested after his testimony (A. 81). The government had no rebuttal evidence, and petitioner thereupon moved for judgment of acquittal at the close of all the evidence; the motion was overruled (A. 81). The Court then released the jury so that instructions could be discussed (A. 82).

After these discussions and just prior to closing argument, the government requested that the exhibits be displayed to the jury. Petitioner vigorously objected that any display of the exhibits to the jury should have come during the government's case, and that this did not constitute proper rebuttal evidence (A. 82-83). The Court not only overruled petitioner's objection but stated a further intention of sending the exhibits to the jury room (A. 83). Petitioner objected to this procedure, especially in view of the fact that there had been no request from the jury to take the exhibits with them (A. 83).

We believe that the display of the exhibits to the jury after petitioner had closed his case gave an undue advantage to the government. The exhibits were part of the government's evidence and if the government desired the jury to examine them, it should have come during the course of the government's case. The net result was that the government had the opportunity of the final word with the jury. This may be proper procedure where the government legitimately introduces rebuttal evidence based upon or counteracting something which develops during a defendant's case; but here the display of the exhibits to the jury was not a proper area for rebuttal. It was part of the government's case in chief, and if the

government desired to display the exhibits to the jury, it should have occurred during their case in chief.

It would appear that the government was attempting to sandbag petitioner and to gain the advantage of being the last to go before the jury. There was no suggestion that the government had inadvertently failed to request display during its case in chief; in fact the government failed to respond to the suggestion by defense counsel that they had some reason for waiting, perhaps ulterior (A. 83).

With reference to the Court's sending the exhibits to the jury, we believe that this also gave undue emphasis to a portion of the government's evidence. There was nothing in the exhibits themselves which were of particular significance to require examination during deliberations. There was no request by the jury to examine the exhibits, and there was nothing on the exhibits which suggested a necessity that the jury have them for further examination during deliberations. We can only speculate as to the effect of a juror retiring with just the bottles of drugs staring him in the face, but we feel that the effect must have been adverse to petitioner when one considers the barrenness of the jury room, except for sinister-appearing drugs.

Examination by the jury in the courtroom and in the jury room added nothing to the jury's knowledge of the case, but the emphasis given to the exhibits by the Court could only have had a prejudicial effect upon the jury. It ought not to be treated as just another discretionary matter, as the Court of Appeals has done. The undue advantage given to the prosecution was sufficient to demonstrate an abuse of discretion.

Because of the importance of this issue in the administration of federal criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

XI

Presentence Investigation Report

Rule 32(c)(2) of the Federal Rules of Criminal Procedure provides in part:

> ". . . The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. . . ."

After petitioner's conviction and at the hearing on his post-trial motion, petitioner's counsel, recognizing that the disclosure of the contents of the presentence investigation report is discretionary, requested that in this instance it be shown to petitioner and his counsel. The District Court said that he would consider the request, indicating that the issue of disclosure had not previously been presented since he became a judge (A. 32-33).

At the sentencing proceedings, petitioner's counsel reminded the Court of the previous request to inspect the report, but the Court denied the request, stating (A. 34): ". . . and I see nothing in the report which would benefit from disclosing, it's a confidential source of information, which might adversely affect my judgment in this matter, . . ." Then, when government counsel was asked whether he had anything to present prior to sentencing, the Assistant United States Attorney stated (A. 34): "I don't believe I do, your Honor. I imagine that the probation report gives a pretty good background on the situation. If so, I don't think there's anything I could add." The Court then imposed sentence on each count, with some consecutive prison sentences. The total sentence amounted to imprisonment for a period of ten years and a $5,000.00 fine.

Petitioner raised the issue of the failure to disclose the presentence investigation report in the Court of Appeals, but the Court's majority opinion summarily rejected the argument by stating that the matter was within the discretion of the trial judge, citing **United States v. MacLeod,** 8 Cir., 436 F. 2d 947, 950, cert. den. 402 U. S. 907. The majority opinion stated that appellant had shown no abuse of discretion in this case.

There was, however, a dissenting opinion written by Circuit Judge Heaney, who apparently had obtained access to the presentence investigation report. The dissent left no doubt that the report did indeed contain derogatory information.[9]

After reviewing the record in this case and previous decisions by the Eighth Circuit, Judge Heaney stated that he "would find that the trial court abused its discretion in refusing to disclose derogatory material in the presentence report and in failing to give the defendant an opportunity to respond to it." The dissenting opinion further stated "that this case presents an appropriate opportunity to fully reexamine our position relating to the disclosure of presentence reports," and referred to numerous authorities in the "growing body of judicial and scholarly opinion" supporting "some measure of mandatory disclosure."

Petitioner believes that this issue should now be reviewed by this Court for two reasons: (a) there was in fact an abuse of discretion in this particular case, and (b) standards should be established by this Court because of the problems which exist throughout the circuits and among all district courts.

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[9] The nature of such derogatory information is still unknown to petitioner and his counsel. The report is not a part of the certified transcript of the record filed with this Petition. Presumably, this Court could request it, as Judge Heaney apparently did.

A. With reference to the abuse of discretion in this particular case, it is obvious that there was derogatory information in the report. Judge Heaney referred to it, and the Assistant United States Attorney, by his reference to the "pretty good background on the situation" contained in the probation report, acknowledged that the report was other than routine. Furthermore, the severity of the sentence imposed by the District Court suggests that the Court must have had access to information not available to the defense, especially in view of the prior unblemished record of petitioner, his substantial position in the community, and his physical condition.

From petitioner's viewpoint, we must conclude that the information in the report was erroneous. As argued at the hearing in the trial Court on the post-trial motion (A. 32-33), if we recognize the hypothesis that petitioner was in fact innocent of the offenses charged, then the government's evidence in court and the government's statements in the presentence investigation report would be incorrect. It is true, of course, that the jury believed the government's version of the facts presented at the trial; but the defense was at least given an opportunity to refute the government's evidence at the trial. Similarly, we submit that, with reference to the sentencing proceeding, the District Court should have afforded petitioner an opportunity to present information to answer that which appeared in the presentence investigation report, even if the District Court thereafter chose to disregard it.

Without having access to the report, it is impossible for petitioner to demonstrate an abuse of discretion. No appellate court could review the background upon which sentences as severe as the one in this case are imposed. There is no basis upon which this or any other Court could meaningfully determine whether there had been an abuse of discretion.

B. If the provisions of Rule 32(c)(2) are to have any meaning whatsoever, then this Court should establish guidelines for trial courts as to the availability of presentence investigation reports. A need for such standards exists because the practice as to disclosure varies throughout the district courts of this country from one extreme to another. For example, in the United States District Court for the Eastern District of Missouri, the presentence investigation report is seldom, if ever, made available to the defense; the undersigned counsel cannot recall ever having seen such a report in almost twenty-four years of practice in this district. On the other hand, counsel was recently engaged in a lengthy trial in the United States District Court for the Central District of California and learned that it is customary practice to disclose the entire report in that district.[10]

Another reason for the establishment of guidelines is that the practice varies from court to court, at least among those in which some disclosure is afforded, as to which portions of the report are disclosed. In some districts, the entire report is revealed; in others, portions are made known, particularly as to prior criminal records; in still

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[10] The defendant in the California case is a resident of the St. Louis area and a portion of the presentence investigation report was prepared by the St. Louis office of the United States Probation and Parole Office and forwarded to California. As a matter of fact, the same probation officer prepared the report in the California case and the case involving this petitioner. (There is no relationship between the two cases, except for the same probation officer.)

When the report to the District Court in California was made available before sentencing, counsel noted numerous instances of erroneous information and impressions supplied to the Court; under the Rule 32(c)(2) practice in California, counsel had an opportunity to correct and explain the misinformation. It is quite likely that the same probation officer utilized similar types of sources of information in the instant case, and it is reasonable to assume that erroneous information herein, without explanation by petitioner, motivated the District Court in Missouri to assess the severe punishment imposed herein.

others (as herein), nothing is disclosed. There are also variations as to methods of disclosure—from the furnishing of a full copy to the defense to the Court's reading or summarizing excerpts from the report. Some courts also comment as to the weight attached to certain portions.

The variation in treatment of the reports and the divergence of opinion are apparent from the numerous authorities which have discussed this issue. We will not unduly lengthen this petition by citations and discussion of the developing authority supporting full disclosure. Some of this authority is collected in fn. 2 of Judge Heaney's dissenting opinion herein. For a very recent discussion on this subject, see **United States v. Janiec**, 3 Cir., Nos. 71-2027 and 71-2149, ... F. 2d ..., 11 Cr.L. 2401, decided June 23, 1972.

Any discussion and definition of procedure under Rule 32(c)(2) would necessarily require analysis, explanation and correlation of decisions of this Court, including the following: **Townsend v. Burke**, 334 U. S. 736; **Williams v. New York**, 337 U.S. 241; **Williams v. Oklahoma**, 358 U. S. 576; **Gregg v. United States**, 394 U. S. 489, and **United States v. Tucker**, 404 U. S. 443. Recent authority has suggested that the defendant's right to examine and refute presentence investigation reports is of constitutional magnitude. See Katkin, "Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues," 55 Minn. L. Rev. 15 (November 1970).

We believe that full dislosure of presentence investigation reports, except for extraordinary circumstances, should be the uniform rule in all districts. Exhaustive discussions of the subject are contained in both the majority and dissenting opinions in **United States v. Dockery**, D. C. Cir., 447 F. 2d 1178, cert. den. 404 U. S. 950. The need for clarification of the law by this Court is suggested by the dissenting opinion of Circuit Judge J. Skelly Wright. Of particular interest is his comment (l. c. 1186):

"There is now an impressive body of scholarly opinion which challenges the idea that subtle, case-by-case evaluation of requests for disclosure is necessary. I have been particularly impressed by several prestigious studies which have concluded with a recommendation of some measure of **mandatory** disclosure of the presentence report's contents in all cases. Indeed, every recent study has come to that conclusion: the National Council on Crime and Delinquency's Model Sentencing Act, the American Law Institute's Model Penal Code, the American Bar Association's Project on Minimum Standards for Criminal Justice, and the Report of the President's Commission on Law Enforcement and Administration of Justice. Most recent commentary in the law reviews have come to the same conclusion. Such a body of informed, scholarly opinion should cause us all to reexamine our toleration of unstructured discretionary disclosure" (footnotes omitted).

Because of the conflict which has developed among the courts and authorities, and because of the need for clarification of this matter of extreme importance in the administration of federal criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

XII

Harmful Totality of Errors

Petitioner acknowledges that one or two of the questions heretofore presented by this petition may not be of sufficient magnitude that this Court would ordinarily grant a petition for writ of certiorari solely as to that particular issue. But we have raised them herein to show that, in the total context of this case, petitioner was denied a fair trial and his constitutional rights were violated in the process of achieving a conviction.

It is one thing to say that an error is harmless or not shown to be prejudicial or that there has been no showing of an abuse of discretion. With appropriate references to Rule 52(a) of the Federal Rules of Criminal Procedure or (former) 28 U.S.C. § 391 or 28 U.S.C. § 2111, this may be a sufficient justification for some courts to permit a conviction to stand.

But we respectfully submit that where the entire case is filled with "harmless errors," the totality of such errors cannot be characterized as harmless. Although each may have been harmless in an otherwise properly conducted trial, together they infect the outcome of the trial and render the conviction improper. The opinion below is an illuminating example.

As to the first issue raised, the variance between indictment and proof is characterized as "harmless error" under Rule 52 (a). Similarly, "the failure to include testimony as to whether it was a salt was harmless error," despite the fact that no one, other than a chemist, would know about such omitted testimony. Without explanation, the omission of "dl" from the indictment in Counts 2, 3 and 4 is a "harmless variance." Although no guidelines are given as to what may be a significant variance, the Court states that "so long as the variance does not affect the substantial rights of the defendant, the variance is immaterial," and the variance here between proof and indictment "was not sufficient to 'affect the substantial rights' of the defendant." In conclusion, but without any real explanation to provide standards by which the matter may be judged, the variance was held "not material."

We are told there was no "reversible error" in the use of the word "drug" rather than "substance" in the instructions, the implication being that there was some error. The refusal to grant a continuance was not ap-

proved as without error, but instead it is said that there was an "absence of a clear abuse of that discretion."

As to the trial Court's remark to the jury about the commission of a crime, error was acknowledged, but petitioner's argument was rejected because "prejudicial error" was not apparent. The Court of Appeals "believed" that adverse effects were removed and that there was no "reasonable possibility" of a contribution to the conviction. Again, no standards are set forth to distinguish between that which is "prejudicial" and that which is "harmless."

The Court of Appeals says that the reasonableness of police conduct in delaying the arrest must be weighed against "possible prejudice" to petitioner. We believe that relative weight is not an appropriate test.

Petitioner's arguments as to the impropriety in the method of displaying the exhibits to the jury and in the refusal to disclose the contents of the presentence investigation report were both rejected because petitioner failed to convince the Court of Appeals that there was an abuse of discretion. As is often the case, with the limitations on information furnished to a defendant, as for example in the presentence report situation, it is an impossibility to show an abuse of discretion.

Thus, time after time, petitioner's arguments were rejected as "harmless error," without a showing of prejudice or of an abuse of discretion. In most instances, the Court of Appeals seemed to recognize the existence of error, but rejected them as not sufficient to justify a reversal.

We recognize that a doctrine of "harmless error" is a necessity in the administration of justice. Otherwise a single issue of little effect could invalidate a lengthy and

costly trial. But here the trial lasted less than two days, and yet it was infected by a number of errors actually acknowledged by the Court below.

We believe that there is a dangerous trend among the Courts to characterize too many errors as harmless or non-prejudicial. The constitutional rights to fair trials and due process of law are being eroded. It would be appropriate for this Court to now review this current trend and to reestablish guidelines for lower courts to follow.

Prior decisions of this Court are not lacking, but we submit they are not being followed. Thus **Berger v. United States**, 295 U. S. 78, recognized the desirability of ending the "too rigid application" of the rule of presuming prejudice and required substantial prejudice under former 28 U.S.C. § 391. But **Kotteakos v. United States**, 328 U. S. 750, 758-766, cautioned against a broad application of the **Berger** case. After a thorough review of the rationale and history behind the harmless error doctrine and a recognition that its application is not a simple task, this Court in **Kotteakos** stated (l. c. 765):

> "But if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In **Chapman v. California**, 386 U. S. 18, this Court again discussed the harmless-error rule and placed the burden on the prosecution to show that the error was harmless

and to convince the court that it was harmless beyond a reasonable doubt. We respectfully submit that the Court of Appeals disregarded the **Chapman** mandate, especially in the instances where it is said that petitioner failed to show an abuse of discretion.

All of the errors in petitioner's conviction were serious and affected the process by which he was convicted. In the aggregate they adversely affected his substantial rights; their cumulative effect was prejudicial. Cf. **Todorow v. United States,** 9 Cir., 173 F. 2d 439, 448, and **Getchell v. United States,** 5 Cir., 282 F. 2d 681, 691.

Especially where it is claimed that the evidence clearly shows guilt, we believe that there is a current tendency among numerous lower federal courts, including those in the instant case, to disregard the clear instructions by this Court in **Bollenbach v. United States,** 326 U. S. 607, 614-615:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C., § 391, 28 U.S.C.A., § 391. All law is technical if viewed solely from concern for punishing crime without heading the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of

the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale L.J. 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. Bruno v. United States, 308 U. S. 287, 293, 294, 60 S. Ct. 198, 200, 84 L.Ed. 257; Weiler v. United States, 323 U. S. 606, 611, 65 S. Ct. 548, 551, 156 A.L.R. 496. From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Because of the application by the Court of Appeals of the harmless-error doctrine in a manner contrary to the guidelines established by decisions of this Court, and because of the necessity of halting the further erosions by many lower courts of the principles of fair trial and due process under the aegis of the harmless-error doctrine, and because of the importance of this issue in the administration of criminal justice within the concept of constitutional traditions, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 71-1268

United States of America,
Appellee,
vs.
Charles Schrenzel,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 16, 1971.
Filed: June 28, 1972.

Before GIBSON and HEANEY, Circuit Judges, and VAN PELT, Senior District Judge.*

VAN PELT, Senior District Judge.

Appellant Charles Schrenzel, a pharmacist, was convicted by a jury on all four counts of an indictment charging him with the illegal sale of stimulant drugs. The four-count indictment charged appellant with violation of 21 U.S.C. § 331(q)(2) in "wilfully, knowingly and unlaw-

* Senior District Judge for the District of Nebraska sitting by designation.

fully" selling and delivering in St. Louis County, within the Eastern District of Missouri, a certain number of capsules or tablets of "a stimulant drug within the meaning of Section 321(v)(2), Title 21, United States Code." Each count alleged a different date. Count 1 charged a sale January 26, 1971, of 400 capsules, more or less, of a combination of d- and dl-amphetamine sulphate. Counts 2, 3, and 4 each alleged a sale of methamphetamine hydrochloride on January 18, 16, and 14, 1971 respectively. The January 18th sale was 200 tablets, more or less, while the January 16th and 14th sales were each of 100 tablets, more or less. The defendant was found guilty on each count. Judge Webster sentenced him to a total of ten years.

On this appeal, Schrenzel raises eleven points ranging from a claim that the government failed to make a submissible case to an assertion that the defendant was entitled to a copy of the presentence investigation report. We have examined each contention and find all wanting in merit. We briefly comment on each.

Appellant claims that the government failed to make a submissible case as to the specific allegations of each count of the indictment. Defendant was employed as a pharmacist in the Teich Pharmacy in Bellefontaine Neighbors, Missouri. William Clark, special agent with the Federal Bureau of Narcotics and Dangerous Drugs, testified that he had made each of the four illegal purchases of drugs from the defendant. Clark's testimony established that he had no prescription for the drugs and that the defendant knew the sales were illegal. This testimony was substantiated by Darrell Ruediger, a police officer from the Narcotics Section of the St. Louis, Missouri police department, who testified that he was with Agent Clark on two of the four dates that sales were made by the defendant. The government also called Ferris Van Sickle, a govern-

ment chemist, who analyzed all the government's drug exhibits.

Count 1 of the indictment, as above explained, charged the defendant with the unlawful sale of 400 capsules, more or less, containing a combination of d- and dl-amphetamine sulphate. Such a drug is a "depressant or stimulant drug" under 21 U.S.C. § 321(v)(2), which was in effect at the time of the alleged sales but has since been repealed. The government chemist testified that the capsules in the government's Exhibit 4, which relates to Count 1, contained d- and dl-amphetamine, commercially known as Biphetamine, which is a mixture of the optical isomers of amphetamine. The chemist's testimony made no mention of sulphate. Count 1, as above noted, included sulphate in its description of the drug charged. The defendant claims that this is a fatal variance and thus the claim that the government has failed to prove its case on Count 1. We believe the variance was harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure.

Certainly a court cannot permit a defendant to be tried on charges which are not made in the indictment against him. *Ex Parte Bain*, 121 U.S. 1, 13 (1887). However, the "true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 85 (1935).

The applicable definition of a "depressant or stimulant drug," found in 21 U.S.C. § 321(v)(2), states: "The term 'depressant or stimulant drug' means . . . (2) Any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit form-

ing because of its stimulant effect on the central nervous system . . ." 79 Stat. 227. The drug in Exhibit 4, as described by the government chemist was included in the statutory definition under subsection (A). In addition, the trial court instructed the jury that a "depressant or stimulant drug" included amphetamine or any of its optical isomers, in addition to *salts* of amphetamine. Because the drug identified by the government chemist at trial was included in the definition of stimulant drugs given in the statute and the trial court's instruction clearly pointed this out to the jury, the failure to include testimony as to whether it was a salt was harmless error.

Appellant makes substantially the same argument with regard to Counts 2, 3, and 4 of the indictment, which charged the unlawful sales of methamphetamine hydrochloride. The government chemist's conclusion was that Exhibits 1, 2, and 3, contained dl-methamphetamine hydrochloride, commercially known as Desoxyn. Appellant contends that the failure to include the "dl-" prefix in the indictment was fatal error.

The regulations promulgated to implement subsection (C) of section 321(v)(2), quoted above, state in part:

> "The Director has investigated and designates all drugs, unless exempted by regulations in this part, containing any amount of the following substances as having potential for abuse and habit-forming because of their stimulant effect on the nervous system: d-, dl-Methamphetamine and their salts." 21 C.F.R. § 320.3(b) (January 1, 1970)

The trial court included the regulation in its instructions to the jury. Thus, the substance described by the government pharmacist as contained in Exhibits 1, 2, and 3 was included under the above regulation as a stimulant drug within the meaning of the statute, and the failure to include the "dl-" prefix was a harmless variance. We

point out that even the manufacturer of the drug, Desoxyn, did not include the "dl-" prefix on the label of the drug.

Appellant's reliance on *Stirone* v. *United States*, 361 U.S. 212 (1960), is misplaced. In that case the Supreme Court held there was a fatal variance between the indictment and the proof, where the indictment charged interference with the *importation* of sand into Pennsylvania while the evidence showed interference with the *exportation* of steel products from Pennsylvania, in addition to importation of sand into Pennsylvania. The trial judge had instructed the jury that it could base a conviction on interference with *either* importation or exportation. The Supreme Court held that no interference with interstate steel shipments was charged in the indictment and thus the variation between the pleading and the proof was so substantial as to destroy the defendant's right to be tried only on charges presented in the indictment returned by the grand jury.

In *Guilbeau* v. *United States*, 288 F. 731 (5th Cir. 1923), the defendant was charged with the sale of morphine sulphate, but the evidence showed the sale of morphine hydrochloride. The Fifth Circuit, in a 2-1 decision, held that the variance was substantial and the conviction could not be sustained.[1] It could be argued that the *Guilbeau* decision requires a reversal here. However, we believe that *Guilbeau* has been overruled in effect by both *Berger* v. *United States*, 295 U.S. 78 (1935)[2] and Rule 52(a) of the Federal

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[1] It is interesting to note that the same court, in *Williams v. United States*, 294 F. 682 (1923), upheld the variance between an indictment which charged the sale of morphine and proof which showed the drug to be a morphine sulphate. In 1924, the Seventh Circuit held directly contrary to *Guilbeau* on basically the same variance. *McIntosh v. United States*, 1 F.2d 427, 428 (1924).

[2] In *Cromer v. United States*, 142 F.2d 697, 698 (D.C. Cir.), *cert. denied*, 322 U.S. 760 (1944), Thurman W. Arnold, speaking for the D.C. Court of Appeals, held that the cases, such as *Guilbeau*, which had adopted the more rigid test in defining the rule against variance had been overruled by *Berger*.

Rules of Criminal Procedure. Rule 52(a) provides: "Any . . . variance which does not affect substantial rights shall be disregarded." In *Berger*, the United States Supreme Court stated:

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." 295 U.S. at 82 (citations omitted).

Thus the rule is that every variance or error does not require reversal. So long as the variance does not affect the substantial rights of the defendant, the variance is immaterial. *Gay* v. *United States*, 408 F.2d 923, 928 (8th Cir. 1969), *cert. denied*, 396 U.S. 823 (1969).[3]

The essence of the indictment against Schrenzel was that he "wilfully, knowingly and unlawfully" sold stimulant drugs, as defined by 21 U.S.C. § 321(v)(2). All of the drugs described at trial as sold by the defendant, and identified by the chemist, were stimulant drugs under section 321(v)(2). The variance between the proof and the indictment was not sufficient to "affect the substantial rights" of the defendant. The defendant was not misled, and the conviction in this case will be a bar to any other prosecution for selling the same drugs. We hold that the variance in this case was not material.

The indictment charged four separate sales of drugs by the defendant on four separate days. Defendant argues

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[3] In *Bronstein v. United States*, 17 F.2d 12, 14 (8th Cir. 1927), this court held that a charge of an illegal sale of gin, when the proof showed a sale of moonshine whiskey, was not a variance requiring a new trial.

that the purchases were part of a "continuing transaction," and thus there was only one offense instead of four. These were separate transactions, with the purchaser buying a different quantity of drug on different dates, even though it was the same drug in three instances. "The test to be applied to determine whether there are two offenses or only one is whether each count requires proof of an additional fact which the other does not." *Harris* v. *United States*, 237 F.2d 274, 276 (8th Cir. 1956) (citations omitted). This test is adequately met here in that in order to substantiate each count the government was required to show the individual sale on each separate day. There was no continuation of one transaction nor was there a merger of crimes in the four separately negotiated sales. It was possible for the jury to have convicted on the sales witnessed by Officer Ruediger, and acquitted as to the other two.

In its instructions to the jury, the trial court used the phrase "depressant or stimulant drug." The appellant argues that the Comprehensive Drug Abuse and Control Act went into effect on October 27, 1970, approximately three months before the offenses in question here, and that Act used the phrase "depressant or stimulant substance," thus making the trial court's use of the term "drug" erroneous.

Upon examining both section 321(v)(2) and the new Comprehensive Drug Abuse and Control Act, we are convinced that there was no error in the use of the term "drug" instead of "substance." Both statutes use the terms interchangeably in various contexts, and the court's use of "drug" rather than "substance" was not reversible error.

Appellant also objects to the trial court's use of the terms "Secretary," "Commissioner," and "Attorney Gen-

eral," interchangeably, and says that the "Commissioner" was the person required to list the drugs which were prohibited. As the government points out these changes in terms came about because of the transfer of the administration of dangerous drug enforcement from the Department of Health, Education and Welfare to the Department of Justice. These changes were fully discussed and upheld by this court in *United States v. Levin*, 443 F.2d 1101, 1104-06 (8th Cir. 1971), *cert. denied*, 404 U.S. 944 (1971). The appellant's argument raises no new issue on this point.

Appellant also contends that the trial court erred in not giving all of the defendant's "position" instruction to the jury. The trial court did give the first two paragraphs of the requested instruction. The rest of the instruction was a statement on burden of proof. The trial court adequately instructed elsewhere on burden of proof. To give the entire requested instruction would have been repetitive.

Appellant argues that the trial court was in error when it refused to transfer the case to the state court. He claims he had certain rights in the state court, such as the opportunity to take the depositions of law enforcement officers on certain matters which were not available to him in federal court. This argument was expressly rejected by this court in *Caton v. United States*, 407 F.2d 367, 376 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969). Appellant has set forth no reason which would persuade us to overrule that decision.

Prior to trial, defendant's attorney, who continues to represent him here, made a motion under Rule 16 of the Federal Rules of Criminal Procedure for discovery and inspection. He demanded the laboratory report on the contents of the drugs to be placed in evidence at the trial. This was furnished him several days prior to trial. De-

fendant's attorney did not indicate at any time prior to trial that he wished to see the actual drugs or their bottles. On the morning of the trial the chemist who had possession of the drugs brought them into court and the defendant and his attorney were given time (approximately forty-five minutes) to inspect them. Defendant now claims he should have been granted a continuance in order to see the bottles for a longer time and determine, by means of the lot number, where the drugs had come from. The granting of a motion for continuance is within the discretion of the trial court. In the absence of a clear abuse of that discretion the trial court will be upheld. *United States v. Leach,* 429 F.2d 956, 963 (8th Cir. 1970), *cert. denied* 402 U.S. 986 (1971). The fact that appellant's counsel was given the laboratory report several days before trial and was allowed to inspect the drugs prior to the trial adequately supports the trial court's denial of the motion for continuance.

Appellant contends he should have been allowed to inspect the grand jury minutes because he believes the indictment was based on hearsay evidence. Defendant's counsel was informed at the hearing on the motion for discovery and inspection that the grand jury minutes had not been recorded. Neither the Constitution nor any statute requires that the minutes of grand jury testimony be recorded or transcribed. *United States* v. *Harflinger,* 436 F.2d 928, 935-36 (8th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971). The failure to record the grand jury testimony is not grounds for dismissal of the indictment returned. *United States* v. *Franklin,* 429 F.2d 274, 276 (8th Cir. 1970), *cert. denied,* 400 U.S. 967 (1970). The trial court properly overruled defendant's motion for inspection of the grand jury minutes.

During the voir dire examination of the jury panel, defense counsel asked whether any of the prospective jurors

were related to any law enforcement official. It developed that one juror, Mrs. Alsop, had a son and brother on the police force of Bellefontaine Neighbors, Missouri, where the drugstore in which defendant worked was located. Government counsel acknowledged that the brother, a Sgt. Rogers, had "some connection" with the case against defendant. Defendant's request that Mrs. Alsop be excused for cause was granted over the government's objection.

Upon being informed that she was excused, Mrs. Alsop stated: "I had no idea what case was going to come up. Should I have volunteered that?" T. p. 100. Judge Webster then attempted to reassure Mrs. Alsop that she had done nothing wrong, but in doing so he made the following statement:

> "You have done nothing improper. The purpose of the question is to determine any possible interest, and in view of your statement that you have a brother who is on the police department in the city *in which the crime occurred,* we just don't want to have any possibility that in the course of the trial you might be embarrassed, or the defendant prejudiced, in any way by some testimony that might come up that would put you on the spot, so we are just going to relieve you of that." T. p. 100 (emphasis supplied).

Because the court had stated "in the city in which the crime occurred," defense counsel immediately moved for a mistrial. The trial court denied the motion, and made the following statements to the jury:

> "Ladies and gentlemen of the jury, in excusing Mrs. Alsop the court inadvertently used a poor choice of words in explaining to her the reason that she was being excused. Of course, you understand that the court did not in anyway intend to imply the existence

of any guilt on the part of this defendant, or, in fact, to prejudge the question of whether a particular crime occurred at all within this district, and within the City of Bellefontaine Neighbors. This defendant, as Mr. Baris has pointed out to you, is to be presumed innocent until proven guilty by competent evidence to your satisfaction beyond reasonable doubt. I referred only to previous statements by counsel which purported to establish the location of the alleged offense. There has been no evidence that an offense has in fact occurred.

"Is that clear to you?

"The indictment is not evidence of an offense. And the court was merely trying to explain to Mrs. Alsop the reason for her being excused, but I want you to know that I have formed no judgment and I am sure that you have formed no judgment as to the guilt or innocence of this defendant, and that he stands innocent at this moment till such time as he is proved by competent evidence to your satisfaction beyond reasonable doubt that he is guilty of the crime for which he is charged.

"Is there anyone in this panel who was in anyway influenced by what I said in my conversation to Mrs. Alsop, or who might in anyway be influenced by what I said?

"(No response from the jury panel.)" T. pp. 101-02

In addition, the trial court gave the following instruction at the conclusion of the case:

"It has been and will be the Court's purpose to express no opinion upon the facts in this case, for that is the sole province of the jury, and if you have thought at any time during the trial that the Court has indicated any opinion with respect to the facts,

you may disregard it, because I have meant nothing by voice or manner to indicate any opinion upon what is or is not a fact in this case, and if at any time during this charge you get the impression that the Court is indicating his own view with respect to the facts, remember that is not at all conclusive upon you. You and you alone shall determine what the facts are in this case." T. pp. 236-7

Appellant contends that the trial court's words relating to "crime" were of such magnitude that no instruction to the jury could overcome the prejudice.

Statements made by the trial judge are not cause for reversal unless prejudicial error is apparent. *United States* v. *Leach, supra,* 429 F.2d at 964, but each record must speak for itself in determining if improper comments by the trial judge were prejudicially erroneous. *United States* v. *Porter,* 441 F.2d 1204, 1215 (8th Cir. 1971). Judge Webster recognized that his comment had been improper and made every effort to point out to the jury that the statement was inadvertent and that the jury was to ignore it. The court carefully pointed out that the defendant stood innocent of the charge until the government established sufficient evidence to convict him and that the court was making no judgment as to the guilt or innocence of the accused. We believe that the statement of Judge Webster to the jury, as above set forth, which was made at the time of the incident and the further comment in the charge, were sufficient to remove any effects the statement may have had on the jurors. We believe that there was no "reasonable possibility" that the judge's comment might have contributed to the conviction. *See United States v. Porter, supra,* 441 F.2d at 1215-16.

Appellant contends that the court committed reversible error in limiting the cross-examination of Agent Clark.

Clark testified on direct examination that he went into the defendant's pharmacy on four occasions and purchased drugs from the defendant. On cross-examination he stated that there were other police officers outside the pharmacy on each occasion. Defense counsel then asked him if one of those officers was Richard Flynn of the St. Louis County police force. After an affirmative answer, he was asked: "Is that the same Officer Flynn who was recently suspended?" T. p. 132. The government objected on the grounds that the question had no relevancy to the case on trial, and the court sustained the objection. Appellant claims this was an improper limitation of his right to cross-examination, in that he was attempting to determine whether the suspension of Officer Flynn was connected in any way with the alleged sales by defendant to Agent Clark.

The government stated it had no intention of calling Officer Flynn to testify. He played no part in the actual buying of the drugs from the defendant and he was only one of several officers in surveillance. The trial court was correct in ruling that the defendant should not be allowed to bring Officer Flynn's suspension into the case on cross-examination of Agent Clark. Officer Flynn was never called to testify and thus his credibility was never put at issue. The trial court's ruling was proper.

As noted earlier, the four separate sales occurred on four separate days. Based upon the first three sales, government agents secured an inspection warrant and this was served immediately after the defendant was arrested. The arrest occurred immediately after the fourth sale. Agent Clark was the arresting officer. Based upon this sequence of events, appellant contends that Agent Clark was not authorized to make the arrest because he had sufficient time to apply for an arrest warrant. It is appellant's position that the standards regarding search warrants must be applied in toto to arrest warrants.

There is no element of a search warrant here since any inspection done by the agents subsequent to the arrest was done pursuant to a valid inspection warrant. In addition, there was ample probable cause for the defendant's arrest, since there had been three previous sales of drugs. The appellant has not indicated how the obtaining of an arrest warrant would have protected his rights any more than they were already protected, nor has he cited any authority for his position.

The reasonableness of police conduct in delaying an arrest in any particular case must be weighed against possible prejudice to the defendant. *Wilson* v. *United States*, 409 F.2d 184, 186 (9th Cir. 1969). The defendant was not prejudiced here because of the manner of arrest, inasmuch as there was ample probable cause for the agent's actions. *Cf.* 26 U.S.C. (Int. Rev. Code 1954) § 7607 (1970).

Appellant's argument that the arrest should have taken place before the fourth offense is also without merit. As stated in *United States* v. *Sizer*, 292 F.2d 596, 599 (4th Cir. 1961):

> "Also without merit is the appellant's contention that he should have been arrested immediately upon the first sale and not given the opportunity to make additional sales. The arrest was not unduly delayed, and it was not improper for the officers to see how far Sizer was prepared to go in his illegal conduct, and to discover, as they did, the source of his supply." (citations omitted)

Because the arrest took place after the last sale was made, there was no need, as contended by appellant, to give the appropriate *Miranda*[4] warnings. In addition, appellant makes no contention that statements were later

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

used against him which had been made without *Miranda* warnings.

Appellant also argues that it was error for the trial court to allow the drug exhibits to be shown to the jury after the defense had rested. The sending of exhibits to the jury in criminal prosecutions is within the trial court's discretion, *Dallago* v. *United States*, 427 F.2d 546, 554 (D.C. Cir. 1969); *Shayne* v. *United States*, 255 F.2d 739, 743 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958), and the appellant has not shown that that discretion was abused here.

Appellant's final contention is that he should have been given a copy of the presentence investigation report. This is a matter within the discretion of the trial judge, *United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir. 1971), *cert. denied*, 402 U.S. 907 (1971). Appellant has shown no abuse of discretion in this case.

The judgment is affirmed.

HEANEY, concurring in part and dissenting in part.

I concur in this decision insofar as it holds that the conviction of the defendant can be sustained. However, I would remand the matter to the trial court because of its failure to disclose to the defendant the substance of a presentence report on him which contained derogatory information.

Although this Court has stated that the decision to permit disclosure of the presentence report is within the discretion of the trial court, we have also recognized that

> "• • • the Advisory Committee, in recommending Rule 32(c), did not contemplate an absolute rule of nondisclosure without relevancy to the particular circumstance of a case. In fact the Advisory Committee observed in part:

> "'*It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences.*' [Emphasis included.] Notes of Advisory Committee on Rules, Fed.R.Crim.P. 32 (c)(2) (18 U.S.C.A. Supp. 1970.)
>
> "See United States v. Fischer, 381 F.2d 509 (2 Cir. 1967)."

United States v. Carden, 428 F.2d 1116, 1118 (8th Cir. 1970).

In *Carden*, we held that it was not an abuse of discretion to deny the defendant's request for his full presentence report where the facts relied upon in sentencing were "fully disclosed to the defendant in such a manner that the defendant had an opportunity to explain any misapprehension the court may have had." See, *United States v. Mims*, 440 F.2d 644 (8th Cir. 1971). We also stated in *United States v. Carden, supra* at 1118:

> "It is always advisable for the trial judge to at least state on the record the various factors he has taken into consideration in rendering his sentence. The court may advise counsel of these factors without necessarily disclosing the sources of the information to him. Such a procedure serves as a checkmate to the danger of misinformation being placed in the hands of the court. Cf. Verdugo v. United States, * * * [402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971)]; Baker v. United States, * * * [388 F.2d 931 (4th Cir. 1968)]. If the defendant's record, as publicly disclosed at the hearing, is incorrectly reported, defendant should have an opportunity to explain any discrepancy. If factual background is erroneous, defendant should have the opportunity to inform the court concerning the alleged misinformation."

At the sentencing proceedings in the present case, the defendant's attorney presented the following statement in mitigation of the sentence:

> "MR. BARIS [counsel for the defendant]: Very briefly, your Honor, I would like to call the court's attention to the fact that Mr. Schrenzel is a man 59 years old, a family man, he has three daughters. He is not a well man. I submitted some letters from Mr. Schrenzel's doctor to the probation officer, and I presume that those have been made available to the court, as to the nature of his heart condition.
>
> "THE COURT: Yes.
>
> "MR. BARIS: And other ailments. He has never been in trouble previously. The effect of this conviction, I think almost certainly, your Honor, is that he will lose his license to practice as a pharmacist."

The defendant's attorney also asked for an opportunity to review the presentence report and respond to it. The court denied this request and did not reveal that there was derogatory material in the report.

In view of these facts and to protect the important interests of the defendant which we recognized in *Carden*, as well as to insure that the intention to afford liberal disclosure is implemented, I would find that the trial court abused its discretion in refusing to disclose derogatory material in the presentence report and in failing to give the defendant an opportunity to respond to it.

I also believe, however, that this case presents an appropriate opportunity to fully reexamine our position relating to the disclosure of presentence reports. I would require the trial court, absent extraordinary circumstances, to disclose to the defendant the substance of the presentence report. Such a requirement would more fully protect the defendant's interests by opening up this aspect

of sentencing to the scrutiny of the defendant and his attorney. It would aid in avoiding the difficulties faced by trial courts in exercising their presently unstructured discretion, and would assist in reviewing the exercise of this discretion.[1] Finally, to impose some measure of mandatory disclosure would be substantially in accord with a growing body of judicial and scholarly opinion.[2]

For the above reasons, this case should be remanded to the trial court with instructions to vacate the sentence, to advise the defendant of the substance of the presentence report, to extend to him an opportunity to respond to this material, and thereafter to impose a new sentence.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[1] See, K. DAVIS, DISCRETIONARY JUSTICE, 133-141 (1969).

[2] *E.g., United States v. Dockery,* 447 F.2d 1178, 1186 (D.C. Cir.), *cert. denied,* 404 U.S. 950 (1971) (dissenting opinion of J. Skelly Wright); *United States v. Bakewell,* 430 F.2d 721, 723 (5th Cir.), *cert. denied,* 400 U.S. 964 (1970) (dissenting opinion of J. Wisdom); *Verdugo v. United States,* 402 F.2d 599, 613 (9th Cir. 1968), *cert. denied,* 402 U.S. 961 (1971) (separate opinion of J. Browning); *Baker v. United States,* 388 F.2d 931, 934 (4th Cir. 1968) (concurring opinion of J. Winter); *State v. Kunz,* 295 A.2d 895 (N.J. 1969); ABA Standards, Sentencing Alternatives and Procedures, § 4.4 (Approved Draft, 1968); Model Penal Code § 7.07(5) (Proposed Official Draft, 1962); The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* 145 (1967); The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts,* 20 (1967); Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Cases,* 52 IOWA L. REV. 161 (1966); Lerlich, *The Use and Disclosure of Presentence Reports in the United States,* 47 F.R.D. 225 (1969); Pugh and Carver, *Due Process and Sentencing: From Mapp to McGautha,* 49 TEX. L. REV. 25, 37 (1970). See also, Note, *Presentence Reports,* 58 GEO. L. J. 451 (1970).

APPENDIX B

JUDGMENT

(Filed June 28, 1972)

United States Court of Appeals
For the Eighth Circuit

No. 71-1268. Crim. September Term, 1971

The United States, Appellee,

vs.

Charles Schrenzel, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with the majority opinion of this Court, this day filed herein.

June 28, 1972

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 71-1268. September Term, 1971

The United States,
Appellee,

vs.

Charles Schrenzel,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

July 28, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-329

CHARLES SCHRENZEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner, a pharmacist, was convicted on four counts charging him with having knowingly sold stimulant drugs to an undercover agent on separate occasions. He was sentenced to a total of ten years' imprisonment and fined $5,000. The court of appeals affirmed, one judge dissenting only as to the failure of the trial judge to permit petitioner to examine the presentence report (Pet. App. A).

Petitioner's numerous contentions relating to his conviction and sentence were raised in the court of appeals and were fully and fairly considered by that

court in its comprehensive opinion. In our view the petition raises no substantial issues of general legal significance, and we rely on the opinion below in contending that further review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972